Kenanga Investors Bhd v Zulrafq Capital Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-489–07 OF 2023
ATAN MUSTAFFA J
10 DECEMBER 2024

Civil Procedure — Discovery — Discovery of documents — Defendants applied for discovery of documents and inspection under O 24 rr 3, 4 and 5 of Rules of Court 2012 — Whether requested documents were relevant to matters in issue — Whether ordering discovery would result in improper shifting of burden of proof — Whether discovery request amounted to fishing expedition

Kenanga Investors Bhd ('KIB') and Zulrafq Capital Sdn Bhd ('ZCSB') entered into a put and call option agreement ('the first option agreement') relating to 190,476,190 shares in KNM Group Bhd worth RM40m ('option shares'). Under this agreement, ZCSB was granted a call option to buy back the option shares from KIB during specified periods, while KIB was granted a put option to sell the option shares to ZCSB. Tan Sri Zulhasnan bin Rafique ('TSZ') executed a personal guarantee in favour of KIB to guarantee ZCSB's performance under the option agreement. KIB and ZCSB entered into a second put and call option agreement ('the second option agreement'). ZCSB applied to KIB for an extension and rollover of both the call option and put option periods which led to the execution of a supplemental option agreement ('the supplemental option agreement'). KIB subsequently issued a notice requiring ZCSB to purchase the option shares for RM44,952,380.84. When this was not fulfilled, KIB issued a letter of demand to both ZCSB and TSZ. KIB filed an action against ZCSB and TSZ seeking specific performance of the obligation to purchase the option shares or alternatively, damages of RM44,952,380.84. In their counterclaim, ZCSB and TSZ alleged that KIB through its director Datuk Wira Ismitz Matthew and Muhammad Taqiuddin Halim ('Taqiuddin'), conspired to injure them by inducing them to enter into the first option agreement, second option agreement and the supplemental option agreement ('the option agreements') while concealing that Taqiuddin would make the payments, subsequently allowing Taqiuddin to default on payments and attempted to purchase the shares at a reduced price. Hence, the application by ZCSB and TSZ for discovery of documents relating to the payment transactions, including receipts and financial records showing details of the payments made under the option agreements. The issues for consideration were: (a) whether the requested documents were relevant to the matters in issue; (b) whether ordering discovery would result in an improper shifting of the burden of proof; and (c) whether the discovery request amounted to a fishing expedition.

Held, dismissing the application with costs of RM3,000:

(1) The requested documents were relevant to the matters in issue. ZCSB and TSZ had sufficiently pleaded in their defence and counterclaim that there was a mutual understanding whereby Taqiuddin would make all payments relating to the agreements. The requested documents comprising receipts and financial records relating to payments made under the agreements could potentially substantiate ZCSB and TSZ's case regarding the existence of this alleged understanding. The requested documents meet the test of relevance for discovery purposes (see paras 18–21).

(2) Ordering discovery would improperly shift the burden of proof from ZCSB and TSZ to KIB. Under s 103 of the Evidence Act 1950, the burden of proving the existence of the alleged mutual understanding lies squarely with ZCSB and TSZ who were asserting it. ZCSB and TSZ were making serious allegations against KIB, including claims of conspiracy and collusion with Taqiuddin. These were weighty allegations that ZCSB and TSZ must prove through their own evidence, not by compelling KIB to produce documents. Discovery could not be allowed to be used as a mechanism to build ZCSB and TSZ's case through KIB's documents. This would effectively require KIB to assist in proving allegations made against itself, which would be an improper reversal of the burden of proof. ZCSB and TSZ must prove their allegations through independent evidence, not through documents they sought to compel KIB to produce (see paras 24–25 & 29).

(3) This discovery application amounted to an impermissible fishing expedition. While ZCSB and TSZ had provided some specific cheque numbers, their request extended beyond these to encompass all transaction details, receipts and payment information related to the agreements. Furthermore, while ZCSB and TSZ alleged that Taqiuddin made these payments through third parties, they had not sought discovery from Taqiuddin himself. This selective targeting of KIB for discovery while not pursuing similar documentation from the alleged source of the payments raised serious questions about the genuine purpose of this application (see paras 32 & 34).

[Bahasa Malaysia summary

Kenanga Investors Bhd ('KIB') dan Zulrafq Capital Sdn Bhd ('ZCSB') telah memeterai perjanjian pilihan jual dan beli ('perjanjian pilihan pertama') berkaitan dengan 190,476,190 saham dalam KNM Group Bhd bernilai RM40 juta ('saham pilihan'). Di bawah perjanjian ini, ZCSB diberikan pilihan panggilan untuk membeli kembali saham pilihan dari KIB dalam tempoh tertentu, sementara KIB diberikan pilihan menjual untuk menjual saham pilihan kepada ZCSB. Tan Sri Zulhasnan bin Rafique ('TSZ')

menandatangani jaminan peribadi bagi pihak KIB untuk menjamin pelaksanaan ZCSB di bawah perjanjian pilihan tersebut. KIB dan ZCSB kemudian menandatangani perjanjian pilihan jual dan beli kedua ('perjanjian pilihan kedua'). ZCSB telah memohon kepada KIB untuk lanjutan dan peralihan kedua-dua tempoh pilihan jual dan beli yang membawa kepada pelaksanaan perjanjian pilihan tambahan ('perjanjian pilihan tambahan'). KIB kemudian mengeluarkan notis yang meminta ZCSB untuk membeli saham pilihan dengan harga RM44,952,380.84. Apabila ini tidak dipenuhi, KIB mengeluarkan surat tuntutan kepada kedua-dua ZCSB dan TSZ. KIB memfailkan tindakan terhadap ZCSB dan TSZ untuk menuntut pelaksanaan khusus bagi kewajipan untuk membeli saham pilihan atau sebaliknya, ganti rugi sebanyak RM44,952,380.84. Dalam tuntutan balas mereka, ZCSB dan TSZ mendakwa bahawa KIB melalui pengarahnya Datuk Wira Ismitz Matthew dan Muhammad Taqiuddin Halim ('Taqiuddin') berkonspirasi untuk mencederakan mereka dengan mendorong mereka untuk memasuki perjanjian pilihan pertama, perjanjian pilihan kedua dan perjanjian pilihan tambahan ('perjanjian pilihan'), sambil menyembunyikan bahawa Taqiuddin akan membuat pembayaran, dan kemudiannya membenarkan Taqiuddin tidak membuat pembayaran serta berusaha untuk membeli saham pada harga yang lebih rendah. Oleh itu, ZCSB dan TSZ memohon untuk penemuan dokumen yang berkaitan dengan transaksi pembayaran, termasuk resit dan rekod kewangan yang menunjukkan butiran mengenai pembayaran yang dibuat di bawah perjanjian pilihan. Isu-isu untuk pertimbangan adalah: (a) sama ada dokumen yang diminta adalah relevan kepada perkara yang dibangkitkan; (b) sama ada perintah penemuan akan menyebabkan pemindahan beban pembuktian yang tidak wajar; dan (c) sama ada permintaan penemuan berjumlah 'fishing expedition'.

Diputuskan, menolak permohonan dengan kos RM3,000:

(1) Dokumen yang diminta adalah relevan kepada perkara yang sedang dipertikaikan. ZCSB dan TSZ telah mencukupi dalam hujah pembelaan dan tuntutan balas mereka bahawa terdapat pemahaman bersama di mana Taqiuddin akan membuat semua pembayaran berkaitan dengan perjanjian. Dokumen yang diminta yang merangkumi resit dan rekod kewangan berkaitan pembayaran yang dibuat di bawah perjanjian tersebut berpotensi untuk menguatkan kes ZCSB dan TSZ mengenai kewujudan pemahaman yang didakwa ini. Oleh itu, dokumen yang diminta memenuhi ujian kaitan untuk tujuan penemuan (lihat perenggan 18–21).

(2) Memerintahkan penemuan akan secara tidak wajar memindahkan beban pembuktian dari ZCSB dan TSZ kepada KIB. Di bawah s 103 Akta Keterangan 1950, beban untuk membuktikan kewujudan pemahaman bersama yang didakwa adalah sepenuhnya terletak pada ZCSB dan TSZ yang menegaskannya. ZCSB dan TSZ membuat dakwaan serius

terhadap KIB, termasuk tuntutan terhadap konspirasi dan kerjasama dengan Taqiuddin. Ini adalah dakwaan yang berat yang perlu dibuktikan oleh ZCSB dan TSZ melalui bukti mereka sendiri, bukan dengan memaksa KIB untuk mengemukakan dokumen. Penemuan tidak boleh digunakan sebagai mekanisme untuk membina kes ZCSB dan TSZ melalui dokumen KIB. Ini akan memerlukan KIB untuk membantu dalam membuktikan dakwaan yang dibuat terhadapnya sendiri, yang merupakan pembalikan beban pembuktian yang tidak wajar. ZCSB dan TSZ mesti membuktikan dakwaan mereka melalui bukti yang bebas, bukan melalui dokumen yang mereka berusaha untuk memaksa KIB kemukakan (lihat perenggan 24–25 & 29).

(3) Permohonan penemuan ini merupakan 'fishing expedition' yang boleh dibenarkan. Walaupun ZCSB dan TSZ telah memberikan beberapa nombor cek khusus, permintaan mereka melampaui angka ini untuk merangkumi semua butiran transaksi, resit dan maklumat pembayaran yang berkaitan dengan perjanjian. Tambahan pula, walaupun ZCSB dan TSZ mendakwa bahawa Taqiuddin telah membuat pembayaran ini melalui pihak ketiga, mereka tidak meminta penemuan dari Taqiuddin sendiri. Pencarian yang selektif terhadap KIB untuk penemuan sementara tidak mengejar dokumentasi serupa dari sumber yang didakwa pembayaran ini menimbulkan persoalan serius mengenai tujuan sebenar permohonan ini (lihat perenggan 32 & 34).]

Cases referred to

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors [2003] 5 MLJ 276, HC (refd)

Licvem Shipping & Trading Aps & Anor v JLM Logistics (M) Sdn Bhd & Ors [2016] 10 MLJ 247, HC (refd)

Ng Pik Lian v United Eastern Resources Sdn Bhd & Ors [2022] MLJU 2676, HC (refd)

The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55, CA (refd)

Wong Hou Lianq & Anor v Wong Kie Yik & Ors [2015] MLJU 358, HC (refd)

Legislation referred to

Evidence Act 1950 s 103

Rules of Court 2012 O 24 rr 3, 4, 5

R Kumarappan (with Nur Parvin Kausar) (Jeeva Partnership) for the plaintiff in the counterclaim.

Teoh Jo Vi (Shaikh David & Co) for the defendant in the counterclaim.

Atan Mustaffa J:

[1] Before the court is an application for discovery of documents and inspection under O 24 rr 3, 4 and 5 of the Rules of Court 2012, together with a prayer for an interim stay of proceedings pending disposal of the discovery application. The documents sought relate to payment records, receipts and transaction details concerning certain agreements between the parties, where payments were allegedly made through third parties. At the heart of the dispute is whether these documents should be disclosed, and whether such disclosure is relevant and necessary for the fair disposal of the substantive action between the parties, where the validity and enforceability of the underlying agreements are contested.

BRIEF FACTS OF THE CASE

[2] On 22 October 2021, the first defendant in the counterclaim, Kenanga Investors Bhd ('KIB'), and the first plaintiff in the counterclaim, Zulrafq Capital Sdn Bhd ('ZCSB') entered into a put and call option agreement ('first option agreement') relating to 190,476,190 shares in KNM Group Bhd worth RM40m ('option shares'). Under this agreement, ZCSB was granted a call option to buy back the option shares from KIB during specified periods, while KIB was granted a put option to sell the option shares to ZCSB. On the same date, the second plaintiff in the counterclaim, Tan Sri Zulhasnan bin Rafique ('TSZ') executed a personal guarantee in favour of KIB to guarantee ZCSB's performance under the option agreement.

[3] The initial call option period was for six months from 5 November 2021 (call option one), followed by another three month period (call option two). The put option period was set at nine months from 5 November 2021, with a maturity date of 4 August 2022.

[4] On 19 January 2022, KIB and ZCSB entered into a second put and call option agreement ('second option agreement'). Following this agreement, five Maybank cheques totalling RM1,979,418 were paid to KIB in January 2022.

[5] On 27 July 2022, ZCSB applied to KIB for an extension and rollover of both the call option and put option periods for a further nine months from 4 August 2022. This led to the execution of a supplemental option agreement dated 3 August 2022 ('supplemental option agreement'). Under this agreement, ZCSB was required to pay a premium of RM4.8m by 15 September 2022 and a rollover fee of RM400,000 by 30 August 2022.

[6] Two sets of payments were made to KIB in relation to these agreements. The first set comprised six payments totalling RM2.6m through various Public

Bank and Maybank cheques. The second set consisted of five Maybank cheques totalling RM1,979,418 made in January 2022.

[7] On 2 May 2023, KIB issued a notice requiring ZCSB to purchase the option shares for RM44,952,380.84. When this was not fulfilled, KIB issued a letter of demand dated 19 June 2023 to both ZCSB and TSZ.

[8] On 13 July 2023, KIB filed this action against ZCSB and TSZ seeking specific performance of the obligation to purchase the option shares or alternatively, damages of RM44,952,380.84.

[9] In their counterclaim, ZCSB and TSZ allege that KIB (through its director Datuk Wira Ismitz Matthew ('Ismitz'), the third defendant in the counterclaim, and Muhammad Taqiuddin Halim ('Taqiuddin'), the second defendant in the counterclaim, conspired to injure them by inducing them to enter into the first option agreement, second option agreement and the supplemental option agreement (together, 'option agreements') while concealing that Taqiuddin would make the payments, subsequently allowing Taqiuddin to default on payments and attempt to purchase the KNM Group Bhd shares at a reduced price.

[10] On 26 March 2024, ZCSB and TSZ, through their solicitors Messrs Jeeva Partnership, sent a letter to KIB's solicitors requesting disclosure of documents related to payments made by third parties pursuant to the option agreements. KIB refused this request.

[11] On 20 May 2024, ZCSB and TSZ filed an application (encl 134) seeking discovery of documents relating to the payment transactions, including receipts and financial records showing details of the payments made under the option agreements.

THE APPLICATION IN ENCL 134

[12] The application in encl 134 is for discovery of documents under O 24 rr 3, 4 and 5 of the Rules of Court 2012. ZCSB and TSZ seek orders for: (a) leave to make the discovery application; (b) an interim stay of proceedings pending disposal of the discovery application; (c) disclosure of documents listed in Annexure A related to transaction details, receipts and financial records for payments made under the option agreements; and (d) costs. The specific documents sought include details of six cheques totalling RM2.6m, five Maybank cheques totalling RM1,979,418, and all payment records related to 'Perjanjian Opsyen Put dan Panggilan bertarikh 28.10.2021, Perjanjian Opsyen Put dan Panggilan bertarikh 19.01.2022 dan Perjanjian Tambahan bertarikh 3.08.2022'. It is is to be noted that no agreement dated 28 October

2021 is referred to in the pleadings and it is likely that this is a typographical error referring to the first option agreement dated 22 October 2021.

[13] The key grounds advanced in support of the application are that: (a) the requested documents are in KIB's possession, custody or power and are relevant to establishing ZCSB and TSZ's defence and counterclaim; (b) the documents could adversely affect KIB's case by showing that Taqiuddin made payments through third parties with KIB's knowledge; (c) disclosure is necessary for fair disposal of the case as it relates to core issues regarding payment obligations under the agreements; (d) the documents requested are specific and identifiable, not a fishing expedition; and (e) KIB has never denied having the documents but merely refused to disclose them. The applicants also argue that an interim stay is warranted to allow their discovery application to be heard before other pending applications, as the documents sought could impact those matters.

ZCSB AND TSZ'S SUBMISSIONS

[14] In support of their discovery application, ZCSB and TSZ contend that the requested documents are specific, identifiable and within KIB's possession, custody and power. They argue that the payment records and transaction details are relevant and necessary for fairly disposing of the case as they would establish that payments were made by Taqiuddin through third parties with KIB's knowledge, thereby supporting their defence that they were not the true contracting parties. They emphasise that the documents sought are basic financial records involving transactions from their own account with KIB, and that KIB has never denied possessing these documents but has merely refused to disclose them. They submit that disclosure is crucial to prove their allegations regarding the true nature of the payment arrangements and would prevent them from being prejudiced in presenting their case.

KIB'S SUBMISSIONS

[15] KIB opposes the discovery application on several grounds. They argue that the source of payments is irrelevant to the contractual obligations under the option agreements, as clause 18 does not restrict who can make payments but specifies the obligation to pay. They contend that the discovery application is a fishing expedition attempting to shift the burden of proof onto KIB, as the documents sought pertain solely to allegations that were never pleaded in ZCSB and TSZ's case. KIB submits that since the cheques were originally exhibited by ZCSB and TSZ in their own affidavits, they should already have knowledge of these documents, making the discovery application unnecessary. They further argue that producing these documents would be onerous given the high volume of transactions through their accounts, and that disclosure based on unclear information might risk revealing unrelated transactions that

could breach their statutory obligations.

ANALYSIS AND FINDINGS OF THE COURT

Whether the requested documents are relevant to the matters in issue

[16] ZCSB and TSZ contend that the requested documents relating to payments made by Taqiuddin are relevant to establish their defence that there was a 'mutual understanding' between the parties that Taqiuddin would be responsible for all payments under the agreements. They argue that Taqiuddin had made initial payments totalling RM2.6m for the first option agreement and RM1,979,418 for the second option agreement through third party cheques, which KIB had accepted. This, they submit, evidences the existence of such an understanding. According to ZCSB and TSZ's pleadings, Taqiuddin attended meetings between the parties and made these payments pursuant to this mutual understanding.

[17] KIB maintains that the source of payments is irrelevant to the contractual obligations under the agreements. They argue that clause 18 of the first option agreement does not restrict the source of payment but rather specifies the obligation to pay. KIB contends that the documents sought pertain solely to the narrative pleaded by ZCSB and TSZ regarding the alleged 'mutual understanding', which was never part of the written agreements between the parties.

[18] Having carefully considered the submissions and evidence, I find that the requested documents are relevant to the matters in issue. The leading authority on relevance in discovery applications remains *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55, where Brett LJ held that documents are relevant if they may either directly or indirectly enable the party requiring them to advance their own case or damage their adversary's case.

[19] ZCSB and TSZ have sufficiently pleaded in their defence and counterclaim that there was a mutual understanding whereby Taqiuddin would make all payments relating to the agreements. They allege at para 11(a) of their defence that 'Pursuant to various discussion among the parties, it is well within the Plaintiff's knowledge and/or Ismitz's knowledge that Taqiuddin has undertaken to make all payments relating to the said Agreements including any fees which is due and payable to the Plaintiff'.

[20] The requested documents comprising receipts and financial records relating to payments made under the agreements could potentially substantiate ZCSB and TSZ's case regarding the existence of this alleged understanding. If

the documents show that payments were indeed made by Taqiuddin through third parties and accepted by KIB, this could lend support to their contention that there was such an arrangement known to all parties.

[21] Accordingly, I find that the requested documents meet the test of relevance for discovery purposes. However, relevance alone is not sufficient to warrant an order for discovery. The court must next consider whether compelling production of these documents would result in an improper shifting of the burden of proof.

Whether ordering discovery would result in an improper shifting of the burden of proof

[22] ZCSB and TSZ argue that the requested documents are necessary to prove their defence that there was a mutual understanding regarding payment obligations. They contend that KIB's refusal to produce basic documents showing payments received from Taqiuddin amounts to active concealment which gives rise to reasonable suspicion of collusion between KIB and Taqiuddin. They submit that the documents will shed light on their claim that KIB was involved and had knowledge of receiving payments from third party cheques arranged by Taqiuddin.

[23] KIB maintains that ZCSB and TSZ are attempting to shift their burden of proof through this discovery application. KIB argues that since ZCSB and TSZ have exhibited the alleged third party cheques in their affidavits, they should already have access to the evidence needed to prove their case. KIB contends that the discovery application is a fishing expedition aimed at building ZCSB and TSZ's case through KIB's documents when ZCSB and TSZ bear the burden of proving their own allegations.

[24] Having considered the submissions, I find that ordering discovery in this case would improperly shift the burden of proof from ZCSB and TSZ to KIB. Under s 103 of the Evidence Act 1950, the burden of proving the existence of the alleged mutual understanding lies squarely with ZCSB and TSZ who are asserting it. This principle was emphasised by the Court of Appeal in *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 per Siti Norma JCA, who held that 'He who alleges must prove such allegation and the onus is on the appellant to do so'.

[25] The pleadings show that ZCSB and TSZ are making serious allegations against KIB, including claims of conspiracy and collusion with Taqiuddin. In their defence and counterclaim dated 10 August 2023, they allege at para 14 that KIB and Taqiuddin 'through their combined efforts, have conspired to

injure the Defendants'. These are weighty allegations that ZCSB and TSZ must prove through their own evidence, not by compelling KIB to produce documents.

[26] This principle was clearly articulated in *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors* [2003] 5 MLJ 276, where Su Geok Yiam JC held that compelling disclosure of documents would improperly shift the legal burden of proving conspiracy from the party making the allegation. In that case, Kenwood sought documents to establish its claim of conspiracy to defraud, but the court held that it is the plaintiff's duty to prove its case, and it would be improper to compel the defendants to provide the evidence that the plaintiff needed to substantiate its claims.

[27] Similarly, in *Ng Pik Lian v United Eastern Resources Sdn Bhd & Ors* [2022] MLJU 2676 (HC), the court dismissed a discovery application on the grounds that it would improperly shift the burden of proof. In that case, the plaintiff sought documents to support her claim of misappropriation of funds, but the court emphasised that it is the plaintiff's responsibility to prove such allegations and that discovery cannot be used as a way to reverse the burden of proof. Her Ladyship Liza Chan Sow Keng JC emphasised that 'A discovery application cannot be a backdoor way of reversing the burden of proof.'

[28] ZCSB and TSZ have already exhibited in their affidavits the alleged third party cheques showing payments of RM2.6m and RM1,979,418. If they wish to prove that these payments were made by Taqiuddin pursuant to some mutual understanding, they should obtain evidence directly from Taqiuddin or the relevant third parties. As noted in KIB's affidavit in reply affirmed by Ismitz on 30 July 2024, if ZCSB and TSZ's pleaded defence is that the whole transaction was due to Taqiuddin's involvement, then questions about payment should be directed to Taqiuddin rather than seeking to compel production of documents from KIB.

[29] The court cannot allow discovery to be used as a mechanism to build ZCSB and TSZ's case through KIB's documents. This would effectively require KIB to assist in proving allegations made against itself, which would be an improper reversal of the burden of proof. ZCSB and TSZ must prove their allegations through independent evidence, not through documents they seek to compel KIB to produce.

Whether the discovery request amounts to a fishing expedition

[30] ZCSB and TSZ contend that the documents sought are specific and identifiable, relating to particular cheque numbers and amounts as detailed in their affidavit in support. They argue that they are seeking precise documentary

evidence of payments made through specific cheques totalling RM2.6m for the first option agreement and RM1,979,418 for the second option agreement. This, they submit, cannot be characterised as a fishing expedition as they have provided specific details of the documents sought.

[31] KIB argues that the discovery request is too wide and constitutes a fishing expedition. They point out that document three in Annexure A of ZCSB and TSZ's application seeks 'any payments transactions paid in relation to the Put and call option dated 28.10.2021, Put and call option agreement dated 19.01.2022, and Supplemental option agreement dated 03.08.2022', which is overly broad. KIB contends that as a financial institution handling high volumes of transactions, such a wide-ranging request would be onerous and potentially expose unrelated transactions.

[32] I find that this discovery application amounts to an impermissible fishing expedition. While ZCSB and TSZ have provided some specific cheque numbers, their request extends beyond these to encompass all transaction details, receipts and payment information related to the agreements. As held in *Licvem Shipping & Trading Aps & Anor v JLM Logistics (M) Sdn Bhd & Ors* [2016] 10 MLJ 247, the High Court found that seeking discovery of all bank accounts and statements was 'far too wide and wholly inappropriate'.

[33] The documents exhibited by ZCSB and TSZ in their own affidavits are telling. In their affidavit in support dated 14 May 2024, they have exhibited as 'TS2' the Maybank cheques allegedly used for payment. As noted in KIB's affidavit in reply affirmed by Ismitz on 30 July 2024, if ZCSB and TSZ already possess these cheques and have exhibited them, it stands to reason that they already have access to the evidence needed to support their allegations.

[34] Furthermore, it is significant that while ZCSB and TSZ allege that Taqiuddin made these payments through third parties, they have not sought discovery from Taqiuddin himself who is the second defendant in the counterclaim. This selective targeting of KIB for discovery while not pursuing similar documentation from the alleged source of the payments raises serious questions about the genuine purpose of this application.

[35] The High Court in *Wong Hou Lianq & Anor v Wong Kie Yik & Ors* [2015] MLJU 358, as cited in *Licvem Shipping*, held that granting such a wide order for discovery without determining the type and nature of the documents would lead to further delay and expenses. This concern is particularly relevant here, as compliance with such a broad request would require extensive review of its banking records and risk disclosure of unrelated transactions.

[36] The court must be vigilant against attempts to use discovery as a means to conduct a general investigation in the hope of uncovering helpful evidence. This is precisely what ZCSB and TSZ appear to be doing here — casting a wide net over KIB's financial records in the hope of finding something to support their allegations of a 'mutual understanding' regarding payment obligations. Such speculative discovery cannot be permitted.

CONCLUSION

[37] While the documents sought by ZCSB and TSZ may be relevant to their pleaded case, allowing discovery in this instance would result in the improper shifting of the burden of proof from ZCSB and TSZ to KIB. ZCSB and TSZ must prove their claims through independent evidence, and discovery cannot be used as a tool to compel KIB to produce the very evidence that ZCSB and TSZ should be providing. Additionally, the broad nature of ZCSB and TSZ's discovery request amounts to a fishing expedition, which cannot be permitted.

[38] For these reasons, ZCSB and TSZ's discovery application is dismissed with costs of RM3,000.

Application dismissed with costs of RM3,000.

Reported by Nabilah Syahida Abdullah Salleh